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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH**

In re:

**EASY STREET HOLDING, LLC et al.,<sup>1</sup>**

Debtors.

Bankruptcy No.09-29905

(Jointly Administered with Cases  
09-29907 and 09-29908)

Chapter 11

Honorable R. Kimball Mosier

**EX PARTE MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS FOR AN ORDER CLARIFYING REQUIREMENT TO PROVIDE  
ACCESS TO CONFIDENTIAL OR PRIVILEGED INFORMATION**

The Official Committee of Unsecured Creditors (the "Committee") for the above-captioned debtors and debtors in possession (the "Debtors"), by its proposed counsel,<sup>2</sup> respectfully requests that this Court enter an order pursuant to Sections 105(a), 107(b) and 1102(b)(3)(A) of Title 11 of the United States Code (the "Bankruptcy Code") and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") clarifying the requirement

<sup>1</sup> The Debtor entities are Easy Street Holding, LLC, Easy Street Partners, LLC, and Easy Street Mezzanine, LLC.

<sup>2</sup> Jones Waldo Holbrook & McDonough, PC has been selected by the Committee as its counsel; however, such retention has not yet been approved by this Court

of the Committee to provide access to confidential or privileged information to creditors (the "Motion"). In further support of this Motion, the Committee respectfully states:

**BACKGROUND**

1. On September 14, 2009 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.
2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).
3. Venue is proper in this District under 28 U.S.C. §§ 1408 and 1409.
4. On October 2, 2009, the Office of the United States Trustee appointed the Committee in these chapter 11 cases pursuant to section 1102(a) of the Bankruptcy Code [DE #76]. The members of the Committee are: Craig Elliott, Elliott Workgroup Architecture, LLC; Stephen Brown, Millcreek Consulting; W. James Tozer, Jr., Gateway Center, LLC; Douglas J. Payne, Fabian & Clendenin; Heather I. Levine, Klehr Harrison Harvey Branzburg & Ellers, LLP; Robert B. Goodrich, Goodrich and Thomas, CPAs; Mary Kay Griffin, CBIZ MHM, LLC; Tom Shaner, Shaner Design, Inc. On October 6, 2009, the Committee selected Jones Waldo Holbrook & McDonough PC as counsel to represent the Committee in all matters during the pendency of these chapter 11 cases. On October 27, 2009, the Committee filed its Application to Retain, Employ and Compensate Waldo Holbrook & McDonough PC as Counsel for the Official Committee of Unsecured Creditors.

**RELIEF REQUESTED**

5. By this Motion, the Committee seeks entry of an order of this Court confirming that the Committee is not authorized or required by Section 1102(b)(3)(A) of the Bankruptcy

Code to provide to any creditor represented by the Committee access to the Debtors' Confidential Information (as defined below) or required to provide access to any such creditor to Privileged Information (as defined below). The requested relief not only will assist in preserving and maximizing the value of the Debtors' estates, but also will protect the Committee by permitting it to review Confidential Information and obtain privileged advice of counsel without risk of violating the Bankruptcy Code by keeping such information confidential and not distributing such information to creditors generally.<sup>3</sup>

### **BASIS FOR RELIEF**

6. As part of the Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Congress enacted section 1102(b)(3) of the Bankruptcy Code. That section states, in relevant part, that a creditors' committee appointed under section 1102(a) of the Bankruptcy Code shall "provide access to information to creditors who (i) hold claims of the kind represented by that committee; and (ii) are not appointed to the committee." 11 U.S.C. §1102(b)(3)(A). Section 1102(b)(3)(A) of the Bankruptcy Code does not indicate in what manner a creditors' committee should provide access to "information" and, more importantly, does not indicate the nature, scope or extent of the "information" that a creditors' committee must provide to its constituents. Further, there appears to be no legislative history to section 1102(b)(3) of the Bankruptcy Code to provide guidance on the application of this provision.

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<sup>3</sup> The rights and obligations of the Committee to provide non-confidential information to its constituency will not be affected by this Motion. The proposed order granting this Motion, in the form attached hereto as Exhibit A, provides that "Nothing in this Order shall expand, restrict, affirm or deny the right or obligation, if any, of the Committee to provide access, or not to provide access, to any information of the Debtors to any party except as explicitly provided herein." As a result, the relief requested herein is limited solely to the potential impact of section 1102(b)(3)(A) of the Bankruptcy Code with respect to Confidential Information and Privileged Information and does not attempt to adjudicate rights or obligations of the Committee or the members of its constituency that might otherwise exist under section 1102(b)(3)(A) of the Bankruptcy Code or otherwise with respect to any other information.

7. The lack of specificity in section 1102(b)(3)(A) of the Bankruptcy Code creates significant issues for debtors and creditors' committees. Typically, a debtor will share various confidential and other non-public proprietary information with a creditors' committee (the "Confidential Information").<sup>4</sup> Creditors' committees may use this information to assess, among other things, a debtor's capital structure, opportunities for restructuring a debtor's business in chapter 11, the results of any revised operations of the debtor in the bankruptcy case, and the debtor's overall prospects for reorganization under a chapter 11 plan. In addition, creditors' committees typically operate pursuant to written by-laws that include confidentiality provisions or enter into other similar arrangements with debtors. In this case, the by-laws of the Committee contain confidentiality provisions. Through this confidentiality arrangement, the Committee and its members and advisors will keep the Debtors' and other parties' sensitive information confidential and will not use non-public information except in connection with these chapter 11 cases and on terms acceptable to the Debtors.

8. As Section 1102(b)(3)(A) of the Bankruptcy Code is silent as to the treatment of Confidential Information, it raises the issue of whether a creditors' committee could be required to share a debtor's or other parties' Confidential Information with any creditor that the Committee represents. In the absence of appropriate protections for the Debtors' Confidential Information, the Debtor or other parties might be unwilling to share such information with the

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<sup>4</sup> For purposes of this Motion, the term "Confidential Information" shall mean any nonpublic information of the Debtors, including, without limitation, documents prepared by the Debtors or their advisors or other agents containing non-public information concerning the Debtors' assets, liabilities, business operations, projections, analyses, compilations or studies which are furnished, disclosed or made known to the Committee, whether intentionally and in any manner, including in written form, orally, or through electronic, facsimile or computer-related communication. Confidential Information shall include: (i) any notes, summaries, compilations, memoranda or similar written materials disclosing or discussing Confidential Information; (ii) any written Confidential Information that is marked confidential by the Debtors or their agents; and (iii) any other Confidential Information conveyed to the Committee orally that the Debtors or their advisors or other agents advise the Committee should be treated as confidential.

Committee, which would undoubtedly impede the Committee's ability to do its work and impair the working relationship between the Committee and other key constituents in the case, most notably the Debtors. Given the importance of the issue and the obvious need to protect Confidential Information from disclosure, the Committee is seeking an order of this Court confirming that section 1102(b)(3)(A) of the Bankruptcy Code does not authorize or require the Committee to provide creditors with access to the Debtors' or other parties' Confidential Information.

9. The enactment of Section 1102(b)(3)(A) of the Bankruptcy Code also raises the related issue of whether a creditors' committee could be required to share with any creditor that the Committee represents information subject to the attorney-client or similar state, federal or other jurisdictional law privilege, whether such privilege is solely controlled by such committee or is a joint privilege with the debtor or some other party (collectively, the "Privileged Information"). Again, the statute and legislative history do not suggest that such a requirement exists. Nonetheless, given the importance of this issue, the Committee is seeking clarification that the Committee is not required to provide creditors with access to Privileged Information. Of course, the Committee would be permitted, but not required, to provide access to Privileged Information to any party so long as (a) such Privileged Information was not Confidential Information, and (b) the relevant privilege was held and controlled solely by the Committee.

10. If there were a risk that Confidential Information given by the Debtors or other parties to the Committee could be disclosed to any creditor, the Debtor or other parties would likely be strongly discouraged from giving Confidential Information to the Committee in the first place. In fact, the Debtors or other parties likely would conclude that they could not give such

information to the Committee for fear of the substantial adverse impact that would result from such disclosure. The inability of the Committee to gain access to Confidential Information, in turn, would limit its ability to fulfill its statutory obligations under the Bankruptcy Code.

11. The relief sought by the Committee will ensure that Confidential Information can be shared with the Committee to allow it to fulfill its role in these Chapter 11 cases. The requested relief will permit the Committee and its advisors to adhere to their confidentiality arrangement with the Debtors without the fear that individual creditors could force them to breach such obligations.

#### **APPLICABLE AUTHORITY**

12. When a statute is clear and unambiguous, “the sole function of the courts is to enforce it according to its terms.” U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241(1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). However, in “rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters ... the intention of its drafters, rather than the strict language, controls.” Id. at 242-43 (citing Griffin v. Oceanic Contractors, Inc., 485 U.S. 564 (1982) (internal quotation omitted)).

13. The Committee respectfully submits that Section 1102(b)(3)(A) of the Bankruptcy Code is unclear and ambiguous. The statute simply requires a committee “to provide access to information,” yet sets forth no guidelines as to the type, kind and extent of the information to be provided. In its extreme, section 1102(b)(3)(A) of the Bankruptcy Code could be read as requiring a committee to provide access to all information provided to it by a debtor, or developed through exercise of its investigative function, regardless of whether the information is

confidential, privileged, proprietary or material non-public information and regardless of whether disseminating such information implicates securities law disclosure requirements. See 17 C.F.R. §§243.100 to 243.103 (2005). Accordingly, bankruptcy courts which have considered this issue have issued orders clarifying that creditors' committees are not required to provide access to confidential or privileged information. See In re Frontier Airlines Holding, Inc., Case No. 08-11298 (Bankr. S.D.N.Y. June 3, 2008) (confirming that the creditors' committee is not authorized or required to provide access to confidential information of the debtors or required to provide access to privileged information); In re Refco, Inc., 2005 WL 3543953 (Bankr. S.D.N.Y. Dec. 23, 2005) (order clarifying the requirement to provide access to information pursuant to section 1102(b)(3)(A) of the Bankruptcy Code and approving information-sharing protocol); In re FLYi, Inc., Case No. 05-2001 (MFW) (Bankr. D. Del. Nov. 17, 2005) (providing that creditors' committees are not required to provide access to confidential information of the debtors or to privileged information).

14. Nothing in section 1102(b)(3)(A) of the Bankruptcy Code itself, nor in the legislative history thereto, suggests that a creditors' committee is required to provide Confidential Information or Privileged Information to all creditors it represents. Indeed, there are compelling reasons to believe that Congress intended to continue to protect Confidential Information and Privileged Information under other provisions of the Bankruptcy Code that were not changed in the 2005 amendments. Section 107(b)(1) of the Bankruptcy Code provides that "on request of a party in interest, the bankruptcy court shall ... protect an entity with respect to trade secret or confidential research, development or commercial information." Section 107(b)(1) of the Bankruptcy Code is mandatory. Video Software Dealers Ass'n v. Orion Pictures Corp.,

21 F.3d 24, 27 (2d Cir. 1994) (providing that the protections of section 107(b)(1) are mandatory upon request). Similarly, Bankruptcy Rule 9018 states, in relevant part, that “on motion or on its own initiative, with or without notice, the court may make any order which justice requires to protect the estate or any entity in respect of a trade secret or other confidential research, development or commercial information ....” As a result, under section 107(b)(1) of the Bankruptcy Code and Bankruptcy Rule 9018, this Court is empowered to protect the Debtors’ Confidential Information and Privileged Information from disclosure to general creditors.

15. The relief requested herein does not interfere with the Committee’s ability to provide information to constituents pursuant to section 1102(b)(3)(A) of the Bankruptcy Code. The Committee believes that it will be able to provide constituents with access to relevant public information concerning the Debtors and their chapter 11 cases, including significant pleadings filed with this Court, the Debtors’ schedules of assets and liabilities and statements of financial affairs, the Debtors’ monthly operating reports and analyses or summaries prepared by the Committee based on non-confidential, non-privileged information. Therefore, notwithstanding the relief requested herein, the Debtors’ creditors will have access to a wealth of relevant information to permit the Committee to satisfy the purposes and requirements of section 1102(b)(3)(A) of the Bankruptcy Code.

16. Therefore, pursuant to sections 105(a), 107(b)(1) and 1102(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9018, the Committee respectfully requests that the relief requested herein be granted to best preserve and maximize the value of the Debtors estates and to assist the Committee to fulfill its statutory role in these chapter 11 cases.



**NOTICE**

17. Notice of this Application has been given to (i) the Debtors; (ii) the Office of the United States Trustee for the District of Utah; and (iii) other parties requesting notice in these cases. In light of the nature of the relief requested herein, the Committee submits that no other notice need be given.

**NO PRIOR REQUEST**

18. No prior application for the relief requested herein has been made by the Committee to this or any other court.

WHEREFORE, the Committee respectfully requests that this Court enter an order granting the relief requested herein and such other and further relief as may be just and proper.

October 27, 2009

Respectfully submitted,

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**PROPOSED COUNSEL FOR OFFICIAL  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *Motion of the Official Committee of Unsecured Creditors for an Order Clarifying Requirement to Provide Access to Confidential or Privileged Information* was served by this Court's CM/ECF system and/or by regular U.S. Mail and/or by facsimile or electronic mail on October 27, 2009 to the parties listed on the attached distribution list.

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Squire  
1329 South 800 East  
Orem, UT 84097-7700

Standard Plumbing Supply  
PO Box 708490  
Sandy, UT 84070

Staples Credit Plan  
Dept 51-7861136819  
PO Box 689020  
Des Moines, IA 50368-9020

State Office of Recovery Services  
515 East 100 South  
P O Box 45033  
Salt Lake City, UT 84145-0033

State of Utah  
Office of the Attorney General  
Tax & Revenue Division  
P O Box 40874  
Salt Lake City, UT 84114-0874

Step Saver Inc.  
1901 West 2425 South  
Wood Cross, UT 84087-2463

Stone Ground Bakery  
PO Box 581078  
Salt Lake City, UT 84158-1078

Summit Business Services  
Attn: Chipper Leonard  
4130 Hilltop Court  
Park City, UT 84098-4715

Summit County Assessor  
PO Box 128  
Coalville, UT 84017-0128

Summit County Public Health Dept  
Environmental Laboratory  
PO Box 128  
Coalville, UT 84017-0128

Sundance Partners, Ltd.  
c/o Ballard Spahr  
201 South Main Street, Suite 600  
Salt Lake City, UT 84111-2212

Swire Coca-Cola USA  
PO Box 1410  
Draper, UT 84020-1410

Sysco Intermountain Food Service  
PO Box 27638  
Salt Lake City, UT 84127-0638

Target Labels & Packaging  
40 West 3800 North  
Hyde Park, UT 84318-4114

N. Allen Taylor  
Taylor Capital Management  
6641 North Paseo Tamayo  
Tucson, AZ 85750

The Chef's Garden  
9009 Huron-Avery Road  
Huron, OH 44839-2448

The Elevator Company  
PO Box 736  
Bountiful, UT 84011-0736

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USA Today  
PO Box 79782  
Baltimore, MD 21279-0782



Union Square Home Owners Association  
PO Box 683300  
Park City UT 84068-3300

United Fence Co.  
PO Box 26933  
2525 South 2700 West  
Salt Lake City, UT 84119-1227

Utah Dept-Alcoholic Beverage Control  
1625 South 900 West  
P O Box 30408  
Salt Lake City, UT 84130-0408

Utah Dept of Workforce Services  
P O Box 45249  
Salt Lake City, UT 84145-0249

Utah State Tax Commission  
Sales Tax  
210 North 1950 West  
Salt Lake City, UT 84134-0400

Wasatch Audio-Visual  
PO Box 770 PMB282  
Park City, UT 84060-0770

Wasatch Meats  
926 South Jefferson Street  
Salt Lake City, UT 84101-2983

Water Images  
PO Box 571393  
Murray, UT 84157-1393

Water Reclamation District  
2800 Homestead Rd  
Park City, UT 84098-4869

Wells Fargo Equipment Finance  
NW-8178 PO Box 1450  
Minneapolis, MN 55485-8178

Wells Fargo Equipment Finance  
733 Marquette Avenue Suite 700  
Minneapolis, MN 55402-2316

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# EXHIBIT A

Order Prepared and Submitted By:

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Troy J. Aramburu (USB #10444)

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*Proposed Counsel to Committee of Unsecured Creditors*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH**

In re:

**EASY STREET HOLDING, LLC et al.,<sup>1</sup>**

Debtors.

Bankruptcy No.09-29905

(Jointly Administered with Cases  
09-29907 and 09-29908)

Chapter 11

Honorable R. Kimball Mosier

<sup>1</sup> The Debtor entities are Easy Street Holding, LLC, Easy Street Partners, LLC, and Easy Street Mezzanine, LLC.

**ORDER CLARIFYING REQUIREMENT OF COMMITTEE TO PROVIDE ACCESS TO  
CONFIDENTIAL OR PRIVILEGED INFORMATION**

THIS MATTER is before the Court on the ex parte motion (the "Motion") of the Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (the "Debtors"), pursuant to sections 105(a), 107(b)(1) and 1102(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9018, for entry of an order confirming that the Committee is not authorized or required to provide to any creditor represented by such Committee access to the Debtors' Confidential Information or required to provide access to Privileged Information, as more fully described in the Motion; and this Court having reviewed the Motion; and this Court having determined that the relief requested is in the best interest of the Debtors, their estates, creditors and the committee; and notice of the Motion having been given to all parties entitled to receive notice; and it appearing that no other or further notice of the Motion need be given; and after due deliberation and sufficient cause appearing therefore; it is hereby

**ORDERED**, that the Motion is granted; and it is further

**ORDERED**, that for purposes of this Order, "Confidential Information" shall mean any nonpublic information of the Debtors or any other party in interest, including, without limitation, documents prepared by the Debtors or their advisors or other agents containing non-public information concerning the Debtors' assets, liabilities, business operations, projections, analyses, compilations or studies which are furnished, disclosed or made known to the Committee, whether intentionally and in any manner, including in written form, orally, or through electronic, facsimile or computer-related communication. Confidential Information shall include: (i) any

notes, summaries, compilations, memoranda or similar written materials disclosing or discussing Confidential Information; (ii) any written Confidential Information that is marked confidential by the Debtors or their agents; and (iii) any other Confidential Information conveyed to the Committee orally that the Debtors or their advisors or other agents advise the Committee should be treated as confidential; and it is further

**ORDERED**, that for purposes of this Order, "Privileged Information" shall mean any information subject to the attorney-client or similar state, federal or other jurisdictional law privilege, whether such privilege is solely controlled by the Committee or is a joint privilege with the Debtors or some other party; and it is further

**ORDERED**, that the Committee (whether operating through its members, advisors or other agents) shall not be authorized or required, pursuant to Section 1102(b)(3)(A) of the Bankruptcy Code, to provide access to any Confidential Information of the Debtors or any other party in interest to any creditor it represents; and it is further

**ORDERED**, that the Committee (whether operating through its members, advisors or other agents) shall not be required, pursuant to Section 1102(b)(3)(A) of the Bankruptcy Code, to provide access to any Privileged Information to any creditor it represents. The committee shall not be authorized to provide any party access to Privileged Information where such Privileged Information is Confidential Information or the relevant privilege is not held and controlled solely by the Committee; and it is further

**ORDERED**, that nothing in this Order shall expand, restrict, affirm or deny the right or obligation, if any, of the Committee to provide access, or not to provide access, to any information of the Debtors to any party except as explicitly provided herein. The entry of this

Order is (a) without prejudice to the rights of the Committee to seek a further order of this Court addressing any additional relief relevant to its functionality and compliance with Section 1102(b)(3)(A) of the Bankruptcy Code and (b) subject to further order of this Court; and it is further

**ORDERED**, that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation and/or interpretation of this Order, and it is further

**ORDERED**, that the Committee is authorized and empowered to take such actions as may be necessary and appropriate to implement the terms of this Order.

--- END OF ORDER ---